Jebsen & Jessen Engineering (M) Sdn Bhd v David a/l Sandanasamy & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-04–104 OF 2003
DENIS ONG, MOHD GHAZALI AND JAMES FOONG JJCA
12 FEBRUARY 2010

Administrative Law — Remedies — Certiorari — Award of Industrial Court — Whether award made upon proper scrutiny of evidence and pleaded facts — Whether award made through serious breach of procedural fairness — Whether award ought to be quashed

Labour Law — Employment — Compensation — Backwages, assessment of — Industrial Court's assessment ignoring fact that employees had been employed for very brief period — Assessment ignoring fact that employees were gainfully employed — Assessment ignoring fact that employees had received compensation from employer based on agreement — Whether such assessment ought to be set aside

Labour Law — Employment — Resignation — Employees choosing to resign with notice when informed of employer's decision to retrench them — Term in employees' contract of employment allowing either employer or employee to terminate such contract with notice — Employees' letters of resignation not coerced or forced by employer — Whether employees able to establish action based on constructive or unfair dismissal

Labour Law — Employment — Retrenchment — Employer briefing employees on bleak economic situation and need to retrench them — Decision to retrench based on LIFO principle — Whether employer adhered to Code of Conduct for Industrial Harmony

Labour Law — Industrial Court — Award — Factors considered in making award — Whether award on wrong principles of assessment in computing backwages — Whether award seriously flawed and ought to be set aside

The respondents were former employees of the appellant. They claimed, inter alia, that they had left the appellant after being pressured, forced and/or coerced into submitting their letters of resignation to the appellant. They contended that they had been dismissed without just cause or excuse and made

representations to the Director General for Industrial Relations pursuant to s 20 of the Industrial Relations Act 1967 to be reinstated to their former employment. Their representations were referred to the Industrial Court which ruled that the respondents had been dismissed without just cause or excuse. The Industrial Court found that the respondents had not resigned voluntarily and since there was no genuine situation of retrenchment existing in the appellant company, the termination of the respondents' employment was done in mala fide. The Industrial Court further ruled that it was not an appropriate case for the respondents to be reinstated to their positions and consequently ordered that they be paid compensation. The High Court dismissed with costs the appellant's application for certiorari to quash the Industrial Court's award. The appellant thus appealed to the Court of Appeal.

Held, allowing the appeal with costs here and below:

(1) The Industrial Court erred in finding that the respondents had been constructively dismissed in that it never dealt with the terms of the contract of employment between the respondents and the appellant before making such a decision. The Industrial Court also never considered the terms of the contract of employment between the respondents and the appellant, including the term that each could terminate the contract of employment by giving the other one month's notice, in arriving at its decision that there was wrongful dismissal. The evidence also showed that the parties came to a settlement. The respondents were informed by the appellant company that they would be retrenched but they chose to resign on their own terms (see paras 34–35).

(2) The appellant had consulted and briefed the respondents on the adverse economic situation it faced before informing them that they would be retrenched. The respondents were chosen for retrenchment based on the 'Last In First Out' ('LIFO') principle. The appellant thus did comply with the general guidelines of the Code of Conduct for Industrial Harmony. The evidence showed that the respondents had tendered their resignations and had collected their monetary benefits without any protest. Their letters of resignations did not reveal that they had resigned due to any coercion, were forced to resign or that the letters were obtained under any compulsion. The appellant was exercising its right to terminate the respondents' employment by giving them one month's notice. The failure by the Industrial Court to consider the contract of employment rendered the contract meaningless (see paras 36–38).

(3) There was a serious breach of procedural fairness in the instant case. The Industrial Court had never considered the appellant's case. The findings of the Industrial Court could not stand having regard to the letters of resignation tendered in evidence. The Industrial Court's award was flawed and ought to be set aside. The Chairman failed to scrutinise all the evidence and the pleaded facts before making the award. Further, there were errors in law when the High Court concluded that the resignations were forced resignations notwithstanding that the respondents had admitted in the Industrial Court that the appellant company did not threaten them to write the resignation letters. The High Court had merely echoed what the Industrial Court had said (see paras 39 & 43–44). *OMX Agro Produce (M) Sdn Bhd v Chairman, Industrial Court, Malaysia & Anor* [1999] 5 MLJ 636 followed.

(4) The Industrial Court had erred in determining the quantum of compensation. It overlooked the fact that the respondents had been in the appellant's employment for a very brief period and that the respondents were gainfully employed and had received compensation from the appellant based on an agreement with it. The Industrial Court had also erred in permitting the respondents to adduce evidence which was never raised in their respective statements of case, such as the allegations of coercion and duress (see paras 40 & 42). *Dr James Alfred (Sabah) v Koperasi Serbaguna Sanya Bhd (Sabah) & Anor* [2001] 3 MLJ 529; [2001] 3 CLJ 541 followed; *Anwar bin Abdul Rahim v Bayer (M) Sdn Bhd* [1998] 2 MLJ 599 followed; *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 referred.

[Bahasa Malaysia summary

Responden-responden merupakan bekas pekerja-pekerja perayu. Mereka menuntut, antara lain, bahawa mereka telah berhenti kerja dengan perayu selepas diberi tekanan, dipaksa dan/atau didesak memberikan surat peletakan jawatan kepada perayu. Mereka menghujah bahawa mereka telah diberhentikan tanpa sebab atau alasan yang munasabah dan membuat representasi kepada Ketua Pengarah Perhubungan Perusahaan berikutan s 20 Akta Perhubungan Perusahaan 1967 untuk dikembalikan kepada pekerjaan lama mereka. Representasi mereka telah dirujuk kepada Mahkamah Perusahaan yang memutuskan bahawa responden-responden tidak meletakkan jawatan secara sukarela dan oleh kerana tidak wujud situasi sebenar bagi pemberhentian di dalam syarikat, penamatan pekerjaan responden-responden adalah dibuat secara mala fide. Mahkamah Perusahaan selanjutnya memutuskan bahawa ia adalah kes yang tidak sesuai bagi responden-responden dikembalikan kepada jawatan asal dan oleh itu mengarahkan bahawa mereka dibayar pampasan. Mahkamah Tinggi menolak dengan kos permohonan perayu untuk certiorari untuk membatalkan award Mahkamah Perusahaan. Perayu oleh itu merayu ke Mahkamah Rayuan.

Diputuskan, membenarkan rayuan dengan kos di mahkamah ini dan Mahkamah Tinggi:

(1) Mahkamah Perusahaan khilaf dalam membuat penemuan bahawa responden-responden telah diberhentikan secara konstruktif di mana ia tidak pernah berurusan dengan terma-terma kontrak pekerjaan di antara responden-responden dan perayu sebelum membuat keputusan sedemikian. Mahkamah Perusahaan juga tidak pernah mempertimbangkan terma-terma kontrak pekerjaan di antara responden-responden dan perayu, termasuk terma bahawa salah satu pihak boleh menamatkan kontrak perkhidmatan dengan memberikan pihak yang satu lagi notis sebulan, dalam membuat keputusan bahawa tidak ada penamatan salah. Keterangan juga menunjukkan bahawa pihak-pihak telah mencapai satu penyelesaian. Responden-responden telah diberitahu oleh syarikat perayu bahawa mereka boleh diberhentikan tetapi mereka memilih untuk meletakkan jawatan atas pilihan sendiri (lihat perenggan 34–35).

(2) Perayu telah berunding dan menjelaskan kepada responden-responden tentang situasi ekonomi yang buruk yang dihadapinya sebelum memberitahu mereka bahawa mereka boleh diberhentikan. Responden-responden dipilih untuk diberhentikan berdasarkan kepada prinsip 'Last In First Out'. Perayu oleh itu telah mematuhi panduan kepada 'Code of Conduct for Industrial Harmony'. Keterangan menunjukkan bahawa responden-responden telah memberikan surat peletakan jawatan dan memperoleh faedah kewangan tanpa apa-apa bantahan. Surat-surat peletakan jawatan tidak mendedahkan bahawa mereka telah meletakkan jawatan kerana desakan, dipaksa meletakkan jawatan atau bahawa surat-surat tersebut diperoleh atas dorongan. Perayu melaksanakan haknya menamatkan pekerjaan responden-responden dengan memberikan mereka notis sebulan. Kegagalan Mahkamah Perusahaan untuk mempertimbangkan kontrak pekerjaan menjadikan kontrak tersebut tidak bermakna (lihat perenggan 36–38).

(3) Terdapat kemungkiran keadilan prosedur yang serius di dalam kes ini. Mahkamah Perusahaan tidak pernah mempertimbangkan kes perayu. Penemuan Mahkamah Perusahaan tidak boleh bertahan melihat kepada surat peletakan jawatan yang dikemukakan sebagai keterangan. Award Mahkamah Perusahaan adalah silap dan mesti diketepikan. Pengerusi gagal menilai kesemua keterangan dan fakta-fakta yang dikemukakan sebelum memberikan award. Selanjutnya, terdapat kekhilafan dari segi undang-undang apabila Mahkamah Tinggi memutuskan bahawa peletakan jawatan adalah sesuatu yang dipaksa walaupun responden-responden telah mengakui di Mahkamah Perusahaan bahawa syarikat perayu tidak mengugut mereka untuk menulis surat peletakan

jawatan. Mahkamah Tinggi semata-mata menyatakan semula apa yang dinyatakan oleh Mahkamah Perusahaan (lihat perenggan 39 & 43–44). *OMX Agro Produce (M) Sdn Bhd v Chairman, Industrial Court, Malaysia & Anor* [1999] 5 MLJ 636 diikut.

(4) Mahkamah Perusahaan telah terkhilaf dalam memutuskan kuantum pampasan. Ia tersilap di dalam fakta bahawa responden-responden bekerja dengan perayu untuk tempoh yang amat singkat dan bahawa responden-responden mempunyai pekerjaan dan telah menerima pampasan daripada perayu berdasarkan kepada perjanjian dengannya. Mahkamah Perusahaan juga terkhilaf di dalam membenarkan responden-responden mengemukakan keterangan yang tidak pernah dibangkitkan di dalam pernyataan kes masing-masing, seperti dakwaan desakan dan dures (lihat perenggan 40 & 42). *Dr James Alfred (Sabah) v Koperasi Serbaguna Sanya Bhd (Sabah) & Anor* [2001] 3 MLJ 529; [2001] 3 CLJ 541 diikut; *Anwar bin Abdul Rahim v Bayer (M) Sdn Bhd* [1998] 2 MLJ 599 diikut; *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 dirujuk.]

Notes

For cases on award of the Industrial Court, see 8(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1411–1476.

For cases on certiorari, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 231–469.

For cases on compensation, see 8(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 880–883.

For cases on resignation, see 8(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1146–1148.

For cases on retrenchment, see 8(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1167–1177

Cases referred to

Anwar bin Abdul Rahim v Bayer (M) Sdn Bhd [1998] 2 MLJ 599, CA (folld)

Dr James Alfred v Koperasi Serbaguna Sanya Bhd & Anor [2001] 3 MLJ 529; [2001] 3 CLJ 541, FC (folld)

OMX Agro Produce (M) Sdn Bhd v Chairman, Industrial Court, Malaysia & Anor [1999] 5 MLJ 636, HC (folld)

R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145, FC (refd)

Legislation referred to

Employment Act 1955

Industrial Relations Act 1967 s 20

Appeal from: Judicial Review Application No R2–25–59 of 2002 (High Court, Kuala Lumpur)

A

TM Varughese (TM Varughese & Co) for the appellant.
P Vickneswaran (David Mathew with him) (Murugavell Arumugam & Co) for the respondents.

B **Mohd Ghazali JCA (delivering judgment of the court):**

[1] The first and second respondents, who were employees of the appellant company considered that they were dismissed without just cause or excuse and hence made representations in writing to the Director General for Industrial Relations pursuant to the provisions of s 20 of the Industrial Relations Act 1967 ('the Act') to be reinstated to their former employment. The representations were subsequently referred to the Industrial Court for an award.

[2] On 11 April 2002 the Industrial Court ruled that the respondents were dismissed without just cause or excuse. It also ruled that it was not an appropriate case for the respondents to be reinstated to their positions in the appellant company and consequently ordered that they be paid compensation, namely, that the first and second respondents be paid the sums of RM17,700 and RM44,075.33, respectively, within 30 days from the date of the award.

[3] The appellant company, upon leave being granted by the High Court, applied for, inter alia, an order of certiorari to quash the award of the Industrial Court dated 11 April 2002. On 3 November 2003, the learned judicial commissioner ('JC') dismissed the application with costs and hence, this appeal.

[4] We had allowed the appeal by the appellant company with costs here and below and ordered that certiorari be issued to quash the Industrial Court's award and ordered that the deposit be refunded to the appellant company. Our reasons are as follows.

THE BACKGROUND

[5] The appellant company is a supplier of engineering plant and equipment and also provide services as an engineering contractor.

THE FIRST RESPONDENT

[6] The first respondent commenced working with the appellant company on 14 August 1997 as an accounts assistant (position grade 'S1') with a

monthly salary of RM1,600 and was placed on six months probation. With regard to termination, it is stated in his letter of appointment as follows:

> Termination Notice:
>
> Either party may terminate this contract by giving to the other, in writing, one (1) day's notice or pay-in-lieu of such notice at any time whilst on probation and one (1) month's notice or pay-in-Iieu of such notice, upon confirmation.

[7] It was also stated in the letter of appointment as follows:

> In general, your employment with our Company will be governed by the 'Basic Terms of Employment for Local Staff' ('Staff Terms'), as amended which forms an integral part of your employment contract. Copy of the current edition of these terms is enclosed for your guidance.

[8] With regard to retrenchment, para 17 of the 'Staff Terms', inter alia, reads:

> During the employment period, the Company reserves the right to terminate the agreement by giving to the employee a minimum of one month's notice in writing of such intention in the event of any adverse economic or political development affecting the Company, the loss of any one of the relevant agencies or any other events beyond the control of the Company which would render the services of the employee redundant.

[9] The first respondent was confirmed in his post with effect from 14 February 1998.

[10] About 5 1/2 months later, by letter dated 31 July 1998 and signed by the regional managing director, the appellant company wrote to the first respondent as follows:

> After a lengthy review of the financial performance of the Company and in view of the current economic situation of the country, the management has reluctantly decided to restructure its operations.
>
> As a result of this decision, your services has been made redundant. Unfortunately we have no suitable alternative position for you.
>
> Your services will terminate as of 31 August 1998 and your last day with the Company will be today in order to allow you time-off to look for another job.
>
> As per the discussion, termination benefits amounting to RM547.07 (Ringgit Five Hundred Forty-seven And Cents Seven Only) will be paid to you via your bank account together your August salary.
>
> We thank you for having served us and wish you success in your future undertakings.

[11] The first respondent replied by a handwritten letter also dated 31 July 1998 which read as follows:

> Dear Sir,
>
> *Re: Resignation - 2 1/2 months notice*
>
> I would like to tender my resignation as Accounts Assistant with effect 31st July 1998 due to current problem affecting the company.

[12] By letter also dated 31 July 1998 the appellant company replied as follows:

> *RESIGNATION*
>
> We are in receipt of your resignation letter dated 31 July 1998 and confirm that this is acceptable.
>
> As you are serving the Company with 2.5 months notice, you will be paid till 15 October 1998 together with the one (1) day annual leave due to you and not yet taken. All such monies, after taking into consideration the EPF, Income Tax and SOCSO deductions, will be paid to you via your bank account. We trust that this amount payable will be in full and final payment.
>
> As agreed your last day of work is on 31 July 1998, after which you are no longer a staff member of the Company.
>
> We thank you for having served us and wish you success in your future undertakings.

The first respondent read and accepted this letter by signing on the same.

[13] Consequently the appellant company issued a testimonial to the first respondent also dated 31 July 1998 which read as follows:

> *TO WHOM IT MAY CONCERN*
>
> *MR DAVID A/L SANDANASAMY*
>
> This is to confirm that the abovenamed has been in our employment as Accounts Assistant since 14 August 1997.
>
> During his term of employment, Mr David has assisted our Accounts Department in executing the daily accounting transactions of one of our Group companies. His work and conduct have been satisfactory.
>
> Mr David is leaving us on his own accord and we wish him all the best in pursuing his interest and career. We would not hesitate to recommend Mr David to any prospective employer with confidence.

[14] On 6 November 1998 the first respondent accepted a job offer as an administrative officer in a company named Concord Parade (M) Sdn Bhd with a monthly salary of RM1,000 and commenced working on that date. By letter dated 14 June 2000 he tendered his resignation with a request that he would like to stop work on 8 July 2000. Subsequently he commenced working with another company named AMGM Containers (Malaysia) Sdn Bhd with effect from 10 July 2000 as an administrative assistant with a monthly salary of RM1,400.

THE SECOND RESPONDENT

[15] The second respondent commenced working with the appellant company on 10 March 1997 as a service supervisor (position grade 'E4') with a monthly salary of RM2,200 and was placed on probation for six months.

[16] With regard to termination, it is stated in his letter of appointment as follows:

> Termination Notice:
>
> Either party may terminate this contract by giving to the other, in writing, one (1) day's notice or pay-in-lieu of such notice at any time whilst on probation and one (1) month's notice or pay-in-lieu of such notice, upon confirmation.

[17] It is also stated in the letter of appointment as follows:

> In general, your employment with our Company will be governed by the 'Basic Terms of Employment for Local Staff' ('Staff Terms'), as amended which forms an integral part of your employment contract. Copy of the current edition of these terms is enclosed for your guidance.

[18] Paragraph 17 of the 'Staff Terms' read as follows:

> 17. *TERMINATION OF PERMANENT EMPLOYMENT*
>
> 17.1 Either party may terminate the employment by giving the other party one month's notice in writing. The day on which the notice is given shall be included in the period of the notice.
>
> 17.2 Either party may terminate the employment with immediate effect or if notice has already been given as above mentioned, without waiting for the expiry of that notice, by paying to the other party a sum equal to the amount of salary (but excluding any allowances for transport etc.) which would have accrued to the employee during the term of such notice.

[19] With regard to retrenchment, para 18 of the 'Staff Terms' read, inter alia, as follows:

> During the employment period, the Company reserves the right to terminate the agreement by giving to the employee a minimum of one month's notice in writing of such intention in the event of any adverse economic or political development affecting the Company, loss of any one of the relevant agencies or any other events beyond the control of the Company which would render the services of the employee redundant.

[20] The second respondent was confirmed in his post with effect from 10 September 1997.

[21] About ten months later, by a handwritten letter dated 8 July 1998 the second respondent wrote to the appellant company as follows:

> I would like to tender in my resignation. I would also be most grateful and obliged if I could work till 31st July 1998.
>
> I hereby take this opportunity to thank my superior for having given me all the co-operation and support to perform well in my day to day work during my service with the company. I also thank you again for kindly giving me a testimonial.

[22] The appellant company replied by letter dated 9 July 1998 which read as follows:

> *RESIGNATION*
>
> We are in receipt of your resignation letter dated 8 July 1998 and confirm that this is acceptable.
>
> You will be paid till 31 July 1998 together with five (5) days annual leave due to you and not yet taken. As agreed, your last day of work is on 31 July 1998 after which you are no longer a staff member of the Company.
>
> In view of your services, the management has agreed to pay you a separation benefit of RM1,024.67 (Ringgit One Thousand Twenty-four And Cents Sixty-seven Only) to help you tide over the difficult times.
>
> All monies will be paid to you via your bank account. We trust that this amount payable will be in full and final payment.
>
> We thank you for having served us and wish you success in your future undertakings.

The second respondent read and accepted this letter on the same date as endorsed on the same.

[23] On 14 July 1998 the appellant company issued a testimonial to the second respondent which read as follows:

TO WHOM IT MAY CONCERN

MR P JACOB SIMON A/L CHACKO SIMON

This is to confirm that the abovenamed has been in our employment since 10 March 1997.

During his term of employment. Mr Jacob has assisted our Service Department in the administration and management of its after-sales service requirements. He was required to plan and organise the manpower and transportation schedule and ensure all enquiries for complaints if any, are attended to promptly and effectively. It is noteworthy that he is competent and very much esteemed by his peers. His work and conduct have been extremely satisfactory. He could be called upon to carry out his duties and any other tasks conscientiously, efficiently, cheerfully and indeed, in a true spirit of service. In fact, when he was assigned other responsibilities such as assisting in maintaining and upkeeping of the Company's structural, mechanical and electrical facilities, he took on the responsibilities without hesitation. Kindly refer to his Job Description attached.

Mr Jacob is leaving us on his own accord and we wish him all the best in pursuing his interest and career. We certainly miss him, nevertheless, I would not hesitate to recommend Mr Jacob to any prospective employer with confidence

THE INDUSTRIAL COURT

The first respondent's case

[24] The first respondent's case before the Industrial Court was as follows:

(a) on 31 July 1998 he was called by one Ms Angie and one Mr Tai and was asked to resign or face dismissal; he refused to resign and was then given a copy of the letter of dismissal dated 31 July 1998 (reproduced earlier);

(b) on 12 August 1998, one Miss Catherine contacted him at home via telephone and requested that he submit a backdated letter of resignation and that in consideration the appellant company will credit his salary on the following day; he alleged that under these circumstances he was compelled to submit the letter of resignation;

(c) on 13 August 1998, the appellant company accepted his backdated letter of resignation dated 31 July 1998 and extended a copy of the testimonial which was also backdated to 31 July 1998;

(d) he was not allowed to work effective 1 August 1998 onwards upon being served with the said letter dated 31 July 1998 informing him that his services were terminated; and

(e) it is his contention that the appellant company's action on 31 July 1998 amounts to dismissal without just cause or excuse and that the appellant company's subsequent action after 31 July 1998 reflect ill intention and

tantamounts to unfair labour practice.

The second respondent's case

[25] The second respondent's case before the Industrial Court was as follows:

(a) on 8 July 1998 he was asked to meet one Mr A Thanaraj, Mr Andrew Tan and Ms Catherine, the personnel manager; Mr Andrew Tan wanted him to resign as the appellant company was affected by the economic downturn and threatened that if he refused to resign he will eventually be forced out of employment; he was promised that the appellant company will give him a good testimonial and a sum of RM1,024.67 as separation benefit as consideration for his resignation;

(b) under these circumstances, he had no other alternative but to submit a letter of resignation dated 8 July 1998;

(c) the appellant company by letter dated 9 July 1998 accepted his letter of resignation and later gave him a testimonial; and

(d) it is his contention that the appellant company's actions on 8 July 1998 and thereafter demonstrated that he was dismissed without just cause or excuse; he claimed that he was unduly pressurised into submitting his letter of resignation and this amounts to unfair labour practice and a dismissal without just cause or excuse.

The appellant company's case vis-a-vis the first respondent

[26] The appellant company's case in the Industrial Court vis-a-vis the first respondent was as follows:

(a) that the issue before the court is the alleged dismissal on 31 July 1998 and the following is its account of what transpired on 31 July 1998, namely:

(i) the first respondent met Ms Angie and Mr Tai where it was explained to him that the current economic down turn and financial performance was affecting the company;

(ii) the first respondent was informed that he has been identified as one of four employees to be retrenched, being last to join the service, and that there being no other suitable position available, the company has decided to retrench him;

(iii) it then issued him the retrenchment letter giving him one month notice and retrenchment benefits computed on the basis of the Employment Act 1955 and to release him from service immediately without requiring him to serve the notice period so as to provide him more free time to look for other jobs;

(iv) the first respondent refused to accept the said retrenchment letter, which was then withheld, and insisted to have a meeting with the company's managing director on the next working day, ie, 3 August 1998;

(v) on 3 August 1998 Mr Andrew Tan, ie, the managing director together with Ms Angie met with the first respondent and explained the company's current financial situation and the slow down of business; the first respondent appeared to have understood the company's position and made representation on his personal problems including the difficulty to find an alternate job and further that his wife was due to give birth;

(vi) under these circumstances, the first respondent requested not to issue the said retrenchment letter and that he be given time to tender his resignation letter providing 2 1/2 months notice period and promised that he would return with the resignation letter within the next few days;

(vii) the first respondent did not turn up and thus on 7 August 1998 the company's personnel manager contacted him on the telephone and reminded him about the resignation letter; subsequently the first respondent submitted his resignation letter providing therein 2 1/2 months notice effective from 31 July 1998;

(viii) the company released the 2 1/2 months salary as agreed by crediting the sum into his bank account on 8 August 1998 for the period up to 15 October 1998 in full and final settlement;

(b) that the first respondent fully realised the prevailing situation in the company and tendered his resignation on his terms as agreed to by the company in lieu of the company issuing the retrenchment letter; the company did this to accommodate him as he requested and his present claims and distortion of facts are in breach of equity and good conscience;

(c) that the company's letter dated 31 July 1998 wherein it accepted the first respondent's letter of resignation and the testimonial dated 31 July 1998 were issued at the latter's request;

(d) that the first respondent was released from duty after 3 August 1998 at his request to suit his convenience but he was paid his remuneration up to 15 October 1998;

(e) that the first respondent was not dismissed at all but tendered his resignation of his own volition in order to avoid being retrenched in which event he would have received lesser monetary benefits;

(f) that the first respondent was retrenched together with three others from the accounts department for genuine business reasons.

The appellant company's case vis-a-vis the second respondent

[27] The appellant company's case in the Industrial Court with regard to the second respondent was as follows:

(a) the company denied having ever threatened the second respondent to resign as alleged;.

(b) the company pointed out that a separation benefit of RM1,024.67 was paid to the second respondent after having accepted his resignation letter dated 8 July 1998 and that the said testimonial was given at his specific request and was not given as part of the inducement package to lure him to resign involuntarily as alleged;

(c) the company denied that the second respondent was unduly pressured to resign;

(d) the company's business activities were significantly reduced during the year 1998 due to the economic downturn faced by the country as a whole since late 1997 and retrenchment of some members of the staff in the service department where the second respondent was working became unavoidable for the company's survival; as a consequence of this, six employees out of 13 in the service department resigned, including two employees who left voluntarily upon accepting separation benefits in 1998 and 1999;

(e) the manager of the service department and the second respondent voluntarily resigned and accepted the separation benefits;

(f) the second respondent was the last to join the service department among the 13 employees in that department; and

(g) that the second respondent was not dismissed at all and that he tendered the resignation on his own volition.

THE AWARD OF THE INDUSTRIAL COURT

[28] The chairman of the Industrial Court ('the chairman') was of the view that the issues before her were as follows:

(a) whether the letters of resignation of the respondents were procured 'as the result of coercion and force'; and

(b) or as contended by the company that since the company was in genuine retrenchment situation hence the dismissal was with just cause or excuse, and/or the claimants resigned to avoid being retrenched.

[29] In her award, the chairman expressed her views as follows:

(a) in relation to the first respondent, she said 'it is reasonable to conclude that there was coercion on the part of the company to obtain his resignation and that it was not given voluntarily';

(b) in relation to the second respondent, she said:

> The submission that the second claimant was capable of understanding the consequence of his tendering his resignation cannot be equated with it been given voluntarily. The second claimant in his statement of witness (marked as CLS4) stated that he protested strongly against the decision of the managing director to dismiss him but his protest went unheeded. This statement of the second claimant is believable and acceptable since it is reasonable to expect protest from an employee when he has been asked by the management of the company to leave the employment when he has not committed any wrong. The same reaction would also be displayed when an employee is told that he has been selected to be retrenched. Therefore in this case the company had not convincingly and sufficiently rebut the second claimant's evidence that his resignation was given involuntarily.

[30] At the end of the day the chairman was of the view that the first and second respondents did not resign voluntarily and that since there was no genuine situation of retrenchment existing in the appellant company therefore the termination of the respondents 'was done in mala fide'. She consequently concluded that the respondents were dismissed without just cause and excuse.

[31] The chairman then awarded the following compensation:

The first claimant:

(i) Backwages which is calculated from date of dismissal to the last date of hearing, but limited to 24 months. RM1,600 x 24 months = RM38,400

Since the claimant had been gainfully employed three months after the dismissal an adjustment of 50% is made to the backwages hence the amount is RM19,200 (RM38,400 x 50%). To this sum of RM19,200 a deduction of RM3,000 (2 1/2 months salary paid by the company) had to be made leaving a sum of RM16,200 as the amount due to him.

(ii) Compensation in lieu of reinstatement.

Since the claimant was about two weeks short of his first anniversary with the company an amount of RM1,500 is a fair amount to be awarded.

The second claimant:

(i) Backwages which is calculated from the date of dismissal to the last date of hearing but limited to 24 months. RM2,200 x 24 months = RM52,800.

Since the claimant has been gainfully employed but as yet to receive his share of profit, an adjustment of 20% to his backwages is a fair adjustment to be made in view of the absence of any evidence as regards to the ratio in the profit sharing and also the factor that he managed to be gainfully employed only in June 2000. With this adjustment the amount is RM42,240 (RM52,800 x 80%). A sum of RM1,024.67 (being the separation benefit) has to be deducted, thus leaving the balance of RM41,215.33.

(ii) Compensation in lieu of reinstatement of one month salary for each completed year of service ie RM2,200 x 1.3 years (from 5 March 1997 to 31 July 1998) = RM2,860.

Order:

The court therefore for the reasons above stated, orders the company to pay RM17,700 to the first claimant and RM44,075.33 to the second claimant within 30 days from the date of this award.

THE APPLICATION FOR CERTIORARI IN THE HIGH COURT

[32] The appellant company sought judicial review to quash the award of the Industrial Court premised on, inter alia, the following grounds:

(a) that the Industrial Court erred in law and acted without or in excess of jurisdiction in that it addressed and considered the issues outside the scope of the respondents' pleadings;

(b) that the Industrial Court committed error of law in its evaluation and findings on the initial meetings and discussion the company had with the respondents when briefings on their retrenchment were held which were in compliance with the Code of Conduct for Industrial Harmony;

(c) that the Industrial Court erred in law and acted without or in excess of jurisdiction in that it failed to consider and/or give effect to the evidence adduced in court by the company;

(d) that the Industrial Court erred in law in that it ought to have concluded that the resignation letter by the first respondent which he wrote while in his house six days after the alleged threat on 31 July 1998 was done voluntarily and cannot constitute in law an act arising from coercion, force, threat and/or duress; further the first respondent admitted in court that the company did not threaten him in any manner;

(e) that the Industrial Court erred in law in that it misdirected itself in law when it concluded that the second respondent's resignation was involuntary and/or forced on him;

(f) that the Industrial Court erred in law and acted without or in excess of jurisdiction by failing to consider the company's oral and documentary evidence adduced with regard to the undisputed and substantial reduction in the volume of business, operating loss and substantial reduction of employees, from 1997–1998;

(g) that the Industrial Court took into account irrelevant considerations and unlawfully rejected the company's material evidence; and

(h) that the Industrial Court made unwarranted deductions based on faulty judicial reasoning and that it made conclusions based on insufficient judicial appreciation of the evidence adduced during the trial.

[33] In dismissing the application for certiorari to quash the award of the Industrial Court, the learned JC said in her grounds of judgment as follows:

> Having heard the submission by both parties, this court is agreeable with the IC that when the applicant calls the respondents for a meeting, it was done so with the intention to get the respondents to leave the company. I find that the IC did not commit an error of law in its evaluation and finding of the initial meetings to come to a conclusion that 'it triggers the likelihood of the absence or lack of free will on the part of the employees'. I failed to see how the initial meetings and discussion the applicant had with the respondents when briefing the retrenchment were in compliance with the Industrial Code of Harmony more so with the company pre prepared letter dated 31 September 1998. This issue was taken into consideration by the IC as follows:
>
> This factors mentioned by the counsel however cannot be accepted wholly. This is because besides the first claimant's testimony that he was being threatened and pressurised, there was also the existence of his termination letter when he met the management on 31 July 1998. This shows that the first claimant was placed under duress.
>
> It is from my observation COW2 also could not furnish any explanation when questioned as to why both the respondents were not informed about the impending retrenchment prior to the meeting on 31 July 1988 (in relation to the second respondent). Thus, the meeting between the applicant and the respondents cannot be construed as an adherence to the Code of Conduct for Industrial Harmony as alleged by the applicant's counsel.

JUDGMENT OF THIS COURT

[34] As mentioned earlier, we had allowed the appeal by the appellant

company with costs here and below and ordered that certiorari be issued to quash the Industrial Court's award. We were of the unanimous view that the Industrial Court erred in finding that the first and second respondents had been constructively dismissed. We noted that the Industrial Court never dealt with the terms of the contract of employment between the first and second respondents respectively and the appellant company in arriving at the decision that the respondents were constructively dismissed. The evidence showed that both letters of appointment state that upon being confirmed in their appointment, either party may terminate the contract by giving one month's notice or pay-in-lieu of such notice. Further, their employment with the appellant company was also governed by the said 'staff terms' which states that during the employment period, the company reserves the right to terminate the agreement by giving to the employee a minimum of one month's notice in writing of such intention in the event of any adverse economic or political development affecting the company, loss of any one of the relevant agencies or any other events beyond the control of the company which would render the services of the employee redundant.

[35] From our reading of the appeal record, we found that the Industrial Court never considered the terms of the contract of employment between the respondents and the appellant company, including the term that each can give the other one month's notice, in arriving at the decision that there was wrongful dismissal. The evidence showed that the parties came to a settlement. The respondents were informed by the appellant company that they would be retrenched but they chose to resign on their own terms.

[36] It was the appellant company's case that during 1997 and 1998, there was serious economic turmoil in the country and the appellant company was not spared from its effect. The company's volume of business/turnover in 1997 of RM14.8m was substantially reduced to RM5.4m in 1998. Its operating loss in 1997 was RM164,382 which in 1998 was RM1.8m. As a consequence of this and in view of the substantial reduction in the volume of business, the appellant company had to reduce the number of employees on its payroll by retrenchment or voluntary resignation. In selecting the staff to be retrenched, the appellant company applied the 'Code of Conduct for Industrial Harmony' guidelines and selected them based on the 'Last In First Out (LIFO)' principle. It was not disputed that the respondents were the last to be appointed in their respective departments.

[37] The evidence clearly showed that the appellant company consulted and briefed the respondents on the adverse economic situation of the company before intimating that they were to be retrenched and thus did comply with the general guidelines of the Code of Conduct for Industrial Harmony. The first respondent was allowed to go home after the briefing session with the appellant

company to think over and make up his mind as to whether he wants to tender his resignation. About a week later he tendered his resignation letter but on his terms, viz, he gave the appellant company 2 1/2 months notice the effect of which he received 2 1/2 months salary and agreed that his last day of work was on 31 July 1998. The second respondent tendered his resignation letter in the afternoon after the briefing session with the appellant company in the morning of 8 July 1998.

[38] From our reading, the evidence showed that the respondents tendered their resignation and collected the monetary benefits without any protestation. Neither respondent claimed that they were threatened or forced or coerced into tendering their resignation. This is not a case where the respondents were dismissed due to disciplinary action or some form of wrong committed by them in the course of employment. The resignation letters that they wrote, reproduced earlier, speak for itself. Its contents denote that they resigned not due to coercion. The first respondent's letter clearly disclose that he was aware of the appellant company's predicament due to the current economic problem faced by the company. The contents of the resignation letters do not at all show that the respondents' resignation were obtained under compulsion or forced resignation. We noticed that the Industrial Court never dealt with these issues, viz, that there were no allegations of coercion or undue pressure to resign. The appellant company was exercising its right to terminate by giving one month notice. The failure by the Industrial Court to consider the contract of employment would render these documents to be meaningless.

[39] Learned counsel for the appellant company, in his written submission, contended as follows:

> Both the Industrial Court and the High Court concluded, without any or any proper appreciation and evaluation of the evidence adduced and the principles of law on retrenchment, that there was no genuine situation of retrenchment existing in the Company at the material time. The Court did not consider and/or give effect to the Company's document/any evidence adduced in Court on the ground that it was raised during the Company's case. It even failed to have regard to Section 30(5) of the Industrial Relations Act 1967. Thus, there was misdirection of law.

We would agree with the above submission. In our judgment, there was a serious breach of procedural fairness in this case. The findings of the Industrial Court cannot stand having regard to the letters of resignation tendered in evidence. Further, we found there are errors in law when the learned JC concluded that the resignations were forced resignations notwithstanding that the respondents admitted in the Industrial Court that the appellant company did not threaten them to write the resignation letters.

[40] The second ground on which we are of the view that the Industrial

Court erred in law is in respect of the quantum of compensation. One should not overlook, as the Industrial Court did in this case, the fact that the respondents had been in the employment of the appellant company for a very brief period of time. Further, the Industrial Court failed to take into account that the respondents were already gainfully employed and had received compensation from the appellant company under an agreement that they had reached with the company. The failure to consider these relevant factors constitute an error of law as the Industrial Court's jurisdiction to award back wages is not unfettered.

[41] In *Dr James Alfred v Koperasi Serbaguna Sanya Bhd & Anor* [2001] 3 MLJ 529; [2001] 3 CLJ 541, Steve Shim CJ (Sabah & Sarawak) at said at p 532 (MLJ); pp 544–545 (CLJ) as follows:

> Now, it is well settled that awards of Industrial Courts are subject to judicial review on account of jurisdictional errors. In the context of this case, we find the following passage from the speech of Lord Reid in *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 merits particular citation. It reads:
>
> It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity … But there are many cases where, although the tribunal has jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it has no power to make. It may have failed in the course of the inquiry to comply with the requirement of natural justice. … It may have refused to take into account something which it was required to take into account or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive.
>
> We take the view that the quantum of backwages is a matter within the discretion of the Industrial Court. That discretion is, however, not unfettered. It has to be exercised according to law. In this connection, s 30(5) of the Industrial Relations Act 1967, is significant, and it reads:
>
> The court shall act according to equity, good conscience and the substantial merit of the case without regard to technicalities and legal form.
>
> In our view, it is in line with equity and good conscience that the Industrial Court, in assessing quantum of backwages, should take into account the fact, if established by evidence or admitted, that the workman has been gainfully employed elsewhere after his dismissal. Failure to do so constitutes a jurisdictional error of law. Certiorari will therefore lie to rectify it. Of course, taking into account of such employment after dismissal does not necessarily mean that the Industrial Court has to conduct a mathematical exercise in deduction. What is important is that the Industrial Court, in the exercise of its discretion in assessing the quantum of backwages, should take

into account all relevant matters including the fact, where it exists, that the workman has been gainfully employed elsewhere after his dismissal. This discretion is in the nature of a decision-making process. As such, it is subject to judicial review.

[42] Although the technical rules of pleadings do not apply in the Industrial Court, parties are bound by their pleadings. In the present case the Industrial Court permitted the respondents to adduce evidence on matters which were never raised in their respective statement of case such as the allegation of coercion and duress. In *Anwar bin Abdul Rahim v Bayer (M) Sdn Bhd* [1998] 2 MLJ 599, Mahadev Shankar JCA said (at pp 605–607):

The rule that parties should be confined to the issues raised in their pleadings applies equally in the Industrial Court. This rule is based on justice and equity because it is unfair and unjust to permit a party to raise other points of complaint at the trial of which no formal notice has been given. The Industrial Court made a serious blunder when it permitted *Anwar* to raise all sorts of other matters which were only calculated to prejudice the fair trial of this case. It should have confined itself to the issues raised.

…

It has been repeatedly held by our courts that the proper approach in deciding whether constructive dismissal has taken place is not to ask oneself whether the employer's conduct was unfair or unreasonable (the unreasonableness test) but whether 'the conduct of the employer was such that the employer was guilty of a breach going to the root of the contract or whether he has evinced an intention no longer to be bound by the contract' (see *Holiday Inn, Kuching v Lee Chai Siok Elizabeth* [1992] 1 MLJ 230; [1992] 1 CLJ 141 and *Wong Chee Hong v Cathay Organisation (M) Sdn Bhd* [1988] 1 MLJ 92 at p 94)

…

This case comes very close to what happened in *Malayan Banking Bhd v Association of Bank Officers, Peninsular Malaysia & Anor* [1988] 3 MLJ 204 where Abdoolcader SCJ held at p 207:

In the light of the several matters I have discussed and considered against the background of the law in regard to jurisdictional error, the decision of the Industrial Court was clearly perverse and so devoid of plausible justification that no reasonable body of persons could have reached it. The Industrial Court accordingly transcended its jurisdiction in making the award that it did and the privative provisions of s 33B(1) of the Industrial Relations Act would not accordingly preclude the issue of certiorari in the circumstances.

As Gopal Sri Ram JCA said in *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317 at p 342:

> An inferior tribunal or other decision making authority, whether exercising a quasi-judicial function or purely an administrative function, has no jurisdiction to commit an error of law and it is no longer of concern whether the error is jurisdictional or not. Such distinction ought no longer to be maintained. If there is an error of law upon which the award of the tribunal is found, such error whether of interpretation or otherwise must necessarily be without jurisdiction or in excess of jurisdiction. It follows that the decision of the *Board in South East Asia Fire Bricks v Non-Metallic Mineral Products Manufacturers Employees Union* [1981] AC 363, and all those cases approved by it, are no longer good law. By the same token, the cases of *Kannan & Anor v Menteri Buruh dan Tenaga Rakyat & Ors* [1974] 1 MLJ 90 and *Lian Yit Engineering Works Sdn Bhd v Loh Ah Fon & Ors* [1974] 2 MLJ 41, though disapproved or overruled by the board, must now be taken to have always correctly stated the law.
>
> Since an inferior tribunal has no jurisdiction to make an error of law, its decision will not be immunised from judicial review by an ouster clause, however widely drafted. The ouster clause in s 33B(1) of the Act, therefore, does not disable the High Court from exercising its judicial review of awards of the Industrial Court.
>
> It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law, for the categories of such an error are not closed. But an error of law would be disclosed if the decision maker asks himself the wrong questions, or takes into account irrelevant considerations, or omits to take into account relevant considerations, or if he misconstrues the terms of any relevant statute, or misapplies or mis-states a principle of the general law.

[43] On the law, there is presumption that there is wrongful dismissal whenever a worker is retrenched. However, in the present case, the Industrial Court never dealt with the terms of the contract of employment between the first and second respondent respectively and the appellant company including the term that each can give the other one month notice. The respondents claimed that their resignation was obtained under compulsion or forced resignation but in their respective statement to the Industrial Court, there were no such allegations. It would have been different if they refused to accept the retrenchment letter or the notice to quit from the company. These issues were never dealt with by the Industrial Court. This would render the employment contract meaningless. We were of the view that the High Court merely echoed that the Industrial Court says.

[44] In our judgment there was a serious breach of procedural fairness in this case. Not a word was mentioned in the award as to the merits or otherwise of the appellant company's case. The Industrial Court never considered the appellant company's case. In our view, the findings of the Industrial Court cannot stand having regard to the letters of resignation tendered in evidence. In

OMX Agro Produce (M) Sdn Bhd v Chairman, Industrial Court, Malaysia & Anor [1999] 5 MLJ 636, KC Vohrah J (as he then was) said that a chairman of the Industrial Court is under a duty to scrutinise all the evidence and the pleaded facts. In the case before him, KC Vohrah J was of the view that what the chairman of the Industrial Court did in his award was 'to narrate the evidence of the claimant and accept it uncritically'. He said (at p 638):

> The court made a finding that the company had dismissed the claimant without just cause or excuse and held that he was entitled to claim backwages from the time he was dismissed.
>
> Having heard the arguments of learned counsel of both the applicant and the second respondent and having gone through the record and other connected documents, my view is that the grounds relied upon by the chairman for making his award appeared to be one sided; he readily accepted the evidence of the claimant without testing it against other evidence and was content to rely on the 'I believe him' formula. The chairman did not come to grips with the issues raised in the pleadings and the distinct impression that one gets is that the chairman had lost himself in a thicket of irrelevant issues and evidence, loose and uncritical analysis of evidence and one has to bear in mind the case of *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 which reiterates a long line of principles decided earlier that the Industrial Court cannot consider or admit evidence which is irrelevant to the issues or reject evidence relevant evidence relevant to the issues and come to the wrong conclusion; the court must address its mind on fundamental issues.

KC Vohrah J was of the view that the chairman of the Industrial Court failed to scrutinise all the evidence and the pleaded facts before arriving at his finding and as such found that the award was flawed and had to be set aside. The award of the chairman was accordingly quashed with costs. In the instant case, we were of the view that the award of the Industrial Court was flawed for similar reasons.

[45] The second ground on which we were of the view that the Industrial Court erred in law was in respect of the quantum of compensation. One should not overlook, as the Industrial Court did in the instant case, the fact that the respondents had been in the employment of the appellant for a very brief period of time. The Industrial Court failed to take into account the respondents were already gainfully employed and had received compensation from the appellant company under an agreement that they had reached with the latter. The failure to consider these relevant factors constitutes an error of law as the Industrial Court's jurisdiction to award back wages is not unfettered (see *Dr James Alfred*). Although the technical rules of pleadings do not apply in the Industrial Court, parties are bound by their pleadings (see *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145). In the present case the Industrial Court permitted the respondents to adduce

A evidence on matters which were never raised in their respective statement of case such as the allegation of coercion and duress.

[46] For the aforesaid reasons, we ordered that certiorari be issued to quash the award of the Industrial Court. The appeal was accordingly allowed with costs. The deposit was ordered to be refunded to the appellant.

Appeal allowed with costs here and below.

Reported by Andrew Christopher Simon